

No. 16-1441

---

---

IN THE  
**Supreme Court of the United States**

---

JAIME CARRASCO; ADRIAN DOMINGUEZ;  
CHRISTOPHER FOSTER; CRAIG KAISER;  
JOSE VAZQUEZ; and JASON WEIERS,  
*Petitioners,*

v.

ERNEST JOSEPH ATENCIO, surviving father  
of Ernest Marty Atencio, *et al.*,  
*Respondents.*

---

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

---

**REPLY BRIEF FOR PETITIONERS**

---

EILEEN DENNIS GILBRIDE  
*Counsel of Record*  
GEORGIA A. STATON  
JENNIFER B. ANDERSON  
JONES, SKELTON & HOCHULI, P.L.C.  
40 North Central Avenue, Suite 2700  
Phoenix, Arizona 85004  
(602) 263-1700  
EGilBride@jshfirm.com  
*Counsel for Petitioners*

September 26, 2017

## TABLE OF CONTENTS

|   | Page |
|---|------|
| TABLE OF AUTHORITIES.....   | ii   |
| I. THE NINTH CIRCUIT'S INTEGRAL PARTICIPATION RULE VIOLATES THE DIRECT CAUSATION REQUIREMENT FOR SECTION 1983 LIABILITY ..... | 1    |
| II. THE NINTH CIRCUIT HAS AGAIN IMPROPERLY DEFINED THE QUALIFIED IMMUNITY "RIGHT AT ISSUE" ...                                | 12   |
| CONCLUSION .....  | 13   |

TABLE OF AUTHORITIES

| CASES   | Page(s)   |
|---|-----------|
| <i>Abbott v. Sangamon Cnty., Ill.</i> ,<br>705 F.3d 706 (7th Cir.2013)..... | 11        |
| <i>Creamer v. Porter</i> ,<br>754 F.2d 1311 (5th Cir.1985).....             | 12        |
| <i>Graham v. Connor</i> ,<br>490 U.S. 386 (1989).....                       | 11        |
| <i>Lash v. Lemke</i> ,<br>786 F.3d 1 (D.C. Cir. 2015).....                  | 11        |
| <i>Melear v. Spears</i> ,<br>862 F.2d 1177 (5th Cir. 1989).....             | 11        |
| <i>Rudlaff v. Gillispie</i> ,<br>791 F.3d 638 (6th Cir. 2015).....          | 1         |
| STATUTES  |           |
| 42 U.S.C. § 1983 .....  | 1, 11, 12 |

## I. THE NINTH CIRCUIT'S INTEGRAL PARTICIPATION RULE VIOLATES THE DIRECT CAUSATION REQUIREMENT FOR SECTION 1983 LIABILITY

The Ninth Circuit has continually expanded its integral participation doctrine so it now unlawfully subjects individual police officers to potential Section 1983 liability without the requisite direct causation. Respondents do not defend this doctrine. They skirt the issue by erroneously asserting that a jury could find these Petitioners independently engaged in excessive force by “dog piling on top of” Atencio and “holding him down” while he was tasered and beaten.

The summary judgment record does not support Respondents’ story.<sup>1</sup> The only “facts” Respondents offered in the district court were the non-responsive ones they asserted in response to Petitioners’ fact paragraph 19:

[Petitioners’ fact] 19. After several requests to take his shoes off, Atencio tensed his arms. PPO Hanlon was concerned that Atencio was becoming aggressive. At approximately 2:34:39 a.m., PPO Hanlon took control of one of Atencio’s wrists. [Hanlon Depo., Ex. 1, at 48, 78; Intake Video, Ex. 11, clip Linescan SW from 2:34:24 - 2:34:44.]

---

<sup>1</sup> Nor did Atencio just “delay” taking off his shoes, as Respondents state. Atencio refused several commands to do so, crossing his arms and stating, “you do it,” D.C. Dkt. 348, ¶ 18 – which Respondents said was “undisputed” below. D.C. Dkt. 418, ¶ 18. That is the definition of active resistance. *See, e.g., Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015) (active resistance includes “physically struggling with, threatening, or disobeying officers,” and justifies use of taser to subdue).

[Respondents' response] Disputed. During his entire time in the LineScan Room, Marty did not: "display violent or aggressive behavior" towards anyone; punch anyone; strike anyone; kick anyone; bite anyone; or spit on anyone. See PSOF(AD) ¶ 69. An annotated video of the entire use of force in the LineScan Room is contained on PSOF(AD) Exhibit N, Clip 2.

D.C. Dkt. 418, ¶ 19. This was non-responsive, as no one even suggested that Atencio was violent or punched, kicked, bit, struck or spit on anyone,<sup>2</sup> and Respondents failed to dispute that Atencio tensed his arms, and that PPO Hanlon understandably became concerned because Atencio was un-handcuffed.

More importantly, Respondents failed to controvert virtually every statement of fact thereafter, stating nothing more than "see ¶ 19" in response to all of them:

20. Atencio began actively resisting. Atencio began actively resisting as soon as the Phoenix officers went hands on. [Dominguez Decl., Ex. 7, at ¶ 9; Intake Video, Ex. 11, Linescan SW from 2:34:40 – 2:34:46.]

Disputed. See ¶ 19.

21. The Phoenix officers tried to get Atencio's arms behind his back. Atencio was forcibly resisting to the point that even though there was one officer on each of Atencio's arms, they were not able to get his arms behind his back. Atencio was overpowering the Phoenix officers. [Weiers Decl., Ex. 4, at ¶ 10; Foster

---

<sup>2</sup> Assaulting or attacking the officers would have been "active aggression" (as opposed to active resistance). D.C. Dkt. 343-2 at 34.

Decl., Ex. 9, at ¶¶ 7, 8; Intake Video, Ex. 11, Linescan SW from 2:34:40 – 2:34:46.]

Disputed. *See* ¶ 19.

26. Atencio ended up partially on his right side on the floor. The officers were unable to get Atencio flat on his stomach because he was fighting. [Carrasco Decl., Ex. 10, at ¶¶ 10-11; Foster Decl., Ex. 9, at ¶ 9; Intake Video, Ex. 11, Linescan SW from 2:35:17 – 5:25.]

Disputed. *See* ¶ 19.

27. Once Atencio was on the ground, one of Atencio's arms was under his body. Defendant Weiers knelt down on the floor next to Atencio and leaned over, trying to hold onto Atencio's arm. Atencio clawed at Defendant Weiers, trying to grab Weiers' hand. Atencio scratched Weiers. [Weiers Decl., Ex. 4, ¶ 12.]

Disputed. *See* ¶ 19.

28. Once Atencio was on the ground, Defendant Foster removed Atencio's left shoe and left sock. Atencio continued to fight. Defendant Foster and Defendant Kaiser were trying to control Atencio's legs but Atencio pushed them off like they were paper weight. [Foster Decl., Ex. 9, at ¶ 11.]

Disputed. *See* ¶ 19.

29. Once Atencio was on the ground, Defendant Kaiser knelt beside him and used his hands to control Atencio's right leg and foot, and get Atencio's legs crossed to better control them. [Kaiser Decl., Ex.5, at ¶¶ 16, 21, Att. C. ]

Disputed. *See* ¶ 19.

32. Defendant Foster was able to get a handcuff on Atencio's left wrist, but then lost control of it. Atencio continued to struggle. Loose handcuffs are very dangerous and can be used as a weapon. [Foster Decl., Ex. 9, at ¶ 13; June 17, 2013 Deposition of Blas Gabriel, attached as Ex. 17, at 72, 73.]

Disputed. *See* ¶ 19.

33. Atencio was already on the ground on his stomach when Defendant Dominguez moved to assist in restraining him. Dominguez was at the right upper quadrant of Atencio's body. He grabbed Atencio's right arm and tried to control it while other officers tried to get Atencio handcuffed. [Dominguez Decl., Ex. 7, at ¶¶ 10, 21, Att. F.]

Disputed. *See* ¶ 19.

34. Defendant Dominguez used only soft hands in trying to control Atencio's right arm to get him handcuffed. [Dominguez Decl., Ex. 7, ¶ 11].

Disputed. *See* ¶ 19.

35. The officers were trying to get control of Atencio's hand but he kept getting free. The officers were trying to grab different parts of Atencio's wrists and hands, but Atencio was breaking away with no problem. [August 6, 2013 Deposition of Nicholas French ("French Depo."), attached as Ex. 42, at 89-90.]

Disputed. *See* ¶ 19.

36. Defendant Vazquez entered the search area after Atencio was already on the ground. Shortly after Vazquez entered, Vazquez heard Defendant Weiers say “Taser Taser” and then Weiers deployed the Taser. [Declaration of Jose Vazquez (“Vazquez Decl.”), attached as Ex. 12, ¶¶ 6, 7 Intake Video, Ex. 11, Linescan SW from 2:35:35 – 2:36:15]

Undisputed.

40. At some point during Weiers’ attempts to drive stun Atencio, Weiers received the effects of the Taser and fell backwards and away from Atencio. When Weiers regained his balance he again attempted to drive stun Atencio. At that point, other officers were able to handcuff Atencio. [Weiers Decl., Ex. 4, ¶ 15; Intake Video, Ex. 11, Linescan SW from 2:36:12 – 2:36:26.]

Undisputed.

41. The Taser did not have any effect on Atencio. Atencio continued to struggle and kick and kept going like nothing had happened. It also didn’t appear as though the drive stun had any effect on Atencio. Indeed, it appeared to make Atencio mad. [Hanlon Depo., Ex. 1, at 85-86; French Depo., Ex. 44, at 72, 90.]

Disputed. *See* ¶ 19.

42. After Atencio was tased, Defendant Vazquez moved from Atencio’s side to near his head and knelt on the floor beside him. Atencio was laying partially on his side with



his arms underneath him. [Vazquez Decl., Ex. 12, at ¶¶ 8, 17, Att. E.]

Disputed. After Marty was tased, his hands were brought straight out in front of him, in what has been called the “Superman position.” *See* PSOF(AD) ¶ 101.

43. There was already one handcuff on Atencio, and Defendant Vazquez was able to get a cuff on Atencio’s other hand. Instead of handcuffing Atencio behind his back, Vazquez handcuffed him in front. [Vazquez Decl., Ex. 12, at ¶ 10.]

Undisputed.

44. Once Atencio was handcuffed, Defendant Weiers stood up and other officers also disengaged. [Weiers Decl., Ex. 4, ¶ 15; Intake Video, Ex. 11, Linescan SW from 2:36:56 - 2:37:36.]

Undisputed.

47. Atencio was fighting during the entire effort to restrain him in the search area. Atencio was holding his arm under his body. Officers were unable to get Atencio’s arm out from under his body to get him handcuffed. Officers were giving Atencio commands like, “Give me your hand. Give me your arm.” [Carrasco Decl., Ex. 10, ¶ 13.]

Disputed. *See* ¶ 19.

48. Atencio was not just resisting. He was combative and actively fighting. He was kicking and squirming. He was flailing, and trying to roll over. He was lifting himself up.

[Dominguez Decl., Ex. 7, ¶ 12; Hanlon Depo., Ex. 1, at 82, 85-86.]

Disputed. *See* ¶ 19.

49. Atencio was 5 feet, 9 inches, weighed 208 pounds, and exhibited unusual strength. [Foster Decl., Ex. 9, ¶ 10; Carrasco Decl., Ex. 10, ¶ 11; Hanlon Depo., Ex.1, at 53; Dominguez Decl., Ex. 7, ¶ 12; Kaiser Decl., Ex. 5, ¶ 14; Medical Examiner's Report, attached as Ex. 41, at 5.]

Disputed. *See* ¶ 19.

51. Atencio was not restrained and under control—he was not handcuffed and was still struggling—when Sergeant Weiers deployed the Taser. [Carrasco Decl., Ex. 10, ¶ 14; Dominguez Decl., Ex. 7, ¶ 13; Foster Decl., Ex. 9, ¶ 14; Kaiser Decl., Ex. 5, ¶ 18; Hanlon Depo., Ex. 1, at 51.]

Disputed. *See* ¶ 19.

52. Even when the Taser was deployed, the officers were unable to gain compliance from Atencio. Atencio rolled and was able to break the Taser leads. [Foster Decl., Ex. 9, ¶ 14.]

Disputed. *See* ¶ 19.

53. After the Taser was deployed, Atencio wasn't complying with commands to give up his hands and let the officers handcuff him. Atencio was pushing with his legs and wouldn't let the officers pull his arms out to be handcuffed. Defendant Vazquez was eventually able to get a handcuff on Atencio's other hand. [Vazquez Decl., Ex. 12, at ¶¶ 9, 10; Foster Decl., Ex. 9, at ¶ 15.]

Disputed. *See* ¶ 19.

54. Atencio was under control and being handcuffed at approximately 2:37:07 p.m. [Scheffner Depo., Ex. 13, at 61.]

Undisputed.

55. Approximately two and a half minutes passed from the time that Phoenix Officer Hanlon grabbed Atencio's wrist to the time that Atencio was under control and being handcuffed. [Intake Video, Ex. 11, Linescan SW from 2:34:36 - 2:37:09.]

Disputed. *See* ¶ 19.

60. After Atencio was handcuffed, he made comments to the effect of, "Don't mess with me. I'm an armed forces sniper." He also stated something like, "Wait until I catch my breath. I'm going to fuck you guys up." [Carrasco Decl., Ex. 10, ¶ 16; January 17, 2014 Deposition of Sergio Salinas ("Salinas Depo."), attached as Ex. 14, at 47.]

Disputed. *See* ¶ 19.

61. When Physician Assistant Ian Cranmer asked Atencio if he was okay, Atencio responded, "Anybody that touches me, I'm going to fucking kill you." Cranmer heard a stream of profanities, and saw Atencio struggling. Cranmer was concerned for his safety. [November 21, 2013 Deposition of Ian Cranmer ("Cranmer Depo."), attached as Ex. 27, at 48-49.]

Disputed. *See* ¶ 19.

D.C. Dkt. 418. The list goes on and on. The record thus contains zero evidence that any of these Petitioners personally engaged in excessive force as Respondents suggest; that any Petitioner caused anyone else to engage in excessive force; that any of them “acted in concert” with or had any knowledge that anyone else would spontaneously engage in allegedly excessive force; or that any of these Petitioners had any opportunity to prevent others’ spontaneous, allegedly excessive force. Yet Respondents base their entire position on the notion that these Petitioners could be individually liable even without the integral participation hook. The position is indefensible on the record quoted above.<sup>3</sup>

The record likewise lacks one iota of evidence that any officers dog piled “on top of” Atencio, or put “their full or partial weight on him” or “pinned him to the ground” or “held him in place” so others could strike or taser him, as Respondents assert without record evidence. In truth, the lone deponent who used the term “dog pile” testified:

“Well, from my view, they were all around him”

and he defined a “dog pile” as:

“a large group of people surrounding, I guess is the best way to describe it.”

---

<sup>3</sup> Respondents also conclusorily assert that Petitioners “failed to intervene” in others’ allegedly excessive force, but cite zero evidence from the record that these Petitioners had any opportunity to do so. They err, therefore, in arguing that the failure to intervene theory obviates the need to address the integral participation problem.

D.C. Dkt. 348, Ex. 13, 50:21-25; D.C. Dkt. 343, ¶ 82, Ex. BB, 51:6-7. This is the only testimony Respondents cited below for the idea that officers were “on top of,” “pinned” or “put their weight on” Atencio or “held him down”; and they continue that tactic here. Not one witness testified so. The actual record, in fact, is to the contrary. D.C. Dkt. 348, ¶ 62.<sup>4</sup>

Respondents’ description of the safe cell events is similarly unsupported. Below, Petitioners cited several sworn statements that Atencio was wrestling and squirming while Petitioners used soft empty hands to remove Atencio’s clothes and handcuffs. Respondents did not controvert these facts, but as before, merely said “disputed,” and cited two items: a soundless video of the safe cell in which Atencio is not visible, and their previously-used, but erroneous “dog pile” comment from the line scan room (not the safe cell). *Compare* D.C. Dkt. 348, ¶¶ 70-84, *with* D.C. Dkt. 418, ¶¶ 70-84.

As for Sgt. Weiers, who deployed the taser, as is shown above, Respondents did not controvert the evidence that Atencio began “actively resisting” when PPO Hanlon went hands-on. Indeed, Respondents affirmatively asserted that “Marty was at most actively resisting the officers,” so as to argue that Phoenix Officer French’s attempted carotid hold was excessive. D.C. Dkt. 343, ¶ 81 (“Even Ofc. French’s expert concedes that, at the time it appears that Ofc. French used a carotid chokehold, Marty was at most actively resisting the officers, not being actively aggressive, a level of force below active aggression which is required

---

<sup>4</sup> “In their efforts to gain control of Atencio, none of the MCSO officers were on top of Atencio. Salinas Depo., Ex. 14, at 58; May 19, 2014 Walston Depo., Ex. 15, at 45; Scheffner Depo., Ex. 13, at 51; Intake Video, Ex. 11, Linescan SW.”

for the employment of the technique.”) Respondents even cited the City’s expert testimony that Atencio “had, just within the moments, been actively resistant and now they were taking him to the ground,” D.C. Dkt. 343-2 at 32; “he was in a state of active resistance, not active aggression” by attempting to pull away and avoid a hands-on technique. *Id.* at 33. This affirmative assertion of Atencio’s active resistance was hardly equivocal, as Respondents now claim. They affirmatively made this factual assertion against the City, so cannot now try to divorce themselves from it because it eviscerates their claim against Sgt. Weiers’ taser use.<sup>5</sup>

In short, Respondents cannot avoid the unlawfulness of the Ninth Circuit’s integral participation doctrine by now claiming there is evidence of individual, personal liability for these Petitioners. There is not. Nor can Respondents hide behind their claimed “totality of the circumstances” story – that Petitioners “pinned” Atencio or “held him down” while others beat or tasered him – when that story is unsupported by any evidence. A doctrine that allows these Petitioners to face Section 1983 liability for a co-defendant’s spontaneous strikes is not integral participation; it is impermissible vicarious liability. *Compare Melear v. Spears*, 862 F.2d 1177, 1181, 1186 (5th Cir. 1989) (officer guarding door knew of plan to

---

<sup>5</sup> An arrestee’s active resistance justifies the use of a taser. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (active resistance is one of the three factors justifying the use of force); *see, e.g., Lash v. Lemke*, 786 F.3d 1, 7 (D.C. Cir. 2015) (“[t]here is no clearly established right for a suspect who actively resists and refuses to be handcuffed to be free from a Taser application”); *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 727 (7th Cir.2013) (use of taser against actively resisting suspect either does not violate clearly established law or is constitutionally reasonable).

enter and search without warrant or probable cause); *Creamer v. Porter*, 754 F.2d 1311, 1316–17 (5th Cir.1985) (officer read warrant and was aware that search exceeded warrant’s limited scope but failed to act while other officers exceeded scope of warrant). Without evidence of direct causation, an integral participation doctrine that imposes Section 1983 liability for the spontaneous act of another officer is patently unlawful.

## **II. THE NINTH CIRCUIT HAS AGAIN IMPROPERLY DEFINED THE QUALIFIED IMMUNITY “RIGHT AT ISSUE”**

Petitioners’ second issue is that the Ninth Circuit has once again improperly defined the qualified immunity right at issue without any reference to the facts. The district court defined the right at issue as the right to be free from “an ‘unprovoked and unjustified attack by a prison guard.’” But Respondents have not alleged that these Petitioners who attempted to control Atencio “attacked” him. For that reason alone the lower courts’ description of the “right at issue” is not even close to the facts as to these Petitioners.

Respondents argue that whether Atencio was actively resisting is a fact question. It is not – again, Respondents affirmatively asserted he was actively resisting, to make their case against City Officer French. Active resistance justifies taser use – the only force used by any of these Petitioners – thus there can be no integral participation liability there. And no case clearly establishes that detention officers who use soft empty hands to control an actively resisting detainee can be subject to Section 1983 liability just because a co-defendant might engage in a spontaneous act of alleged excessive force.

Respondents finally err in arguing that the issue here is not “likely to recur.” Officers face uncooperative and actively resisting arrestees and detainees every day. These officers must be assured in knowing that they may use soft empty hands and/or a taser to gain control over that individual without fear of potential liability. The denial of qualified immunity to these Petitioners broadly undermines jail officials’ legitimate interests in ensuring the safety and security of jail facilities.

**CONCLUSION**

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

EILEEN DENNIS GILBRIDE

*Counsel of Record*

GEORGIA A. STATON

JENNIFER B. ANDERSON

JONES, SKELTON & HOCHULI, P.L.C.

40 North Central Avenue, Suite 2700

Phoenix, Arizona 85004

(602) 263-1700

EGilBride@jshfirm.com

*Counsel for Petitioners*

September 26, 2017





E-Mail Address:  
briefs@wilsonepes.com

775 H Street, N.E.  
Washington, D.C. 20002

Web Site:  
www.wilsonepes.com

Tel (202) 789-0096  
Fax (202) 842-4896

No. 16-1441

JAIME CARRASCO; ADRIAN DOMINGUEZ;  
CHRISTOPHER FOSTER; CRAIG KAISER;  
JOSE VAZQUEZ; and JASON WEIERS,

*Petitioners,*

v.

ERNEST JOSEPH ATENCIO, surviving father  
of Ernest Marty Atencio, *et al.*,

*Respondents.*

#### AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on September 26, 2017, three (3) copies of the REPLY BRIEF FOR PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

MICHAEL C. MANNING  
LARRY J. WULKAN  
STINSON LEONARD STREET  
1850 North Central Avenue, Suite 2100  
Phoenix, Arizona 85004-4584  
(602) 279-1600

*Attorneys for Plaintiffs / Respondents  
Atencio et al.*

KATHLEEN L. WIENEKE  
CHRISTINA RETTS  
WIENEKE LAW GROUP  
1095 W. Rio Salado, Suite 209  
Tempe, Arizona 85281  
(602) 715-1868

*Attorneys for Defendants / Co-Petitioners  
Hanlon and French*

MARY R. O'GRADY  
OSBORN MALEDON, P.A.  
2929 N. Central Avenue, Suite 2100  
Phoenix, Arizona 85012  
(602) 640-9000

*Co-counsel for Defendants / Co-Petitioners  
Hanlon and French*

SARAH L. BARNES  
BROENING OBERG WOODS & WILSON, P.C.  
1122 East Jefferson Street  
Post Office Box 20527  
Phoenix, Arizona 85036  
(602) 271-7774

*Attorneys for Defendant / Co-Petitioner Hatton*

The following email addresses have also been served electronically:

EGilBride@jshfirm.com

Michael.manning@stinsonleonard.com

Larry.wulkan@stinsonleonard.com

Kwieneke@wienekelawgroup.com

cretts@wienekelawgroup.com

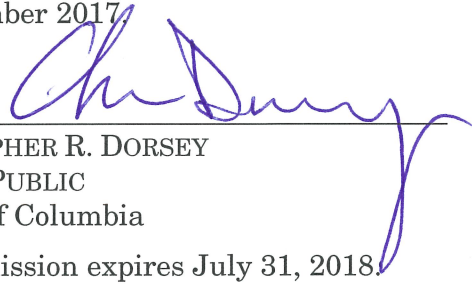
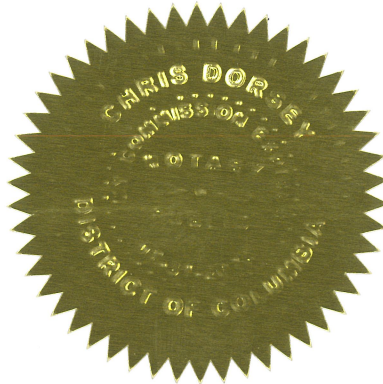
mogrady@omlaw.com

Slb@bowwlaw.com



CASEY HOGAN  
WILSON-EPES PRINTING COMPANY, INC.  
775 H Street, N.E.  
Washington, D.C. 20002  
(202) 789-0096

Sworn to and subscribed before me this 26th day of September 2017.



CHRISTOPHER R. DORSEY  
NOTARY PUBLIC  
District of Columbia

My commission expires July 31, 2018.

IN THE  
**Supreme Court of the United States**

JAIME CARRASCO; ADRIAN DOMINGUEZ;  
CHRISTOPHER FOSTER; CRAIG KAISER;  
JOSE VAZQUEZ; and JASON WEIERS,

*Petitioners,*

v.

ERNEST JOSEPH ATENCIO, surviving father  
of Ernest Marty Atencio, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

**REPLY BRIEF FOR PETITIONERS**

**CERTIFICATE OF COMPLIANCE**

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,973 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 2017.

  
\_\_\_\_\_  
Christopher R. Dorsey  
Wilson-Epes Printing Co., Inc.